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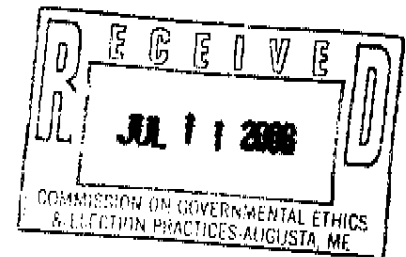
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July 10, 2006

VIA MAIL and FAX (287-6775)

Paul Lavin, Assistant Director
Commission on Governmental Ethics & Elections Practices
242 State Street
Augusta, ME 04333-0135



RE: John Michael - Corrected Notice of Appeal

Dear Mr. Lavin:

In reviewing my July 7 appeal letter, I noticed a big typographical error at the bottom of page 4 and the top of page 5. Please accept this corrected appeal letter as a substitute for my previous letter. Only that typo has been changed from the original.

As you know, I represent John Michael. Mr. Michael hereby appeals your June 30, 2006 decision denying his request for certification as a Maine Clean Election Candidate.

Preliminarily, we note that Title 21-A M.R.S.A. §1125(5) provides, in pertinent part:

“The Commission shall certify a candidate complying with the requirements of [§1125] as a Maine Clean Election Act candidate as soon as possible and no later than 3 business days after final submittal of qualifying contributions.”

Mr. Michael's final submission of qualifying contributions was on Friday, June 16, 2006. Three business days after that date would have been June 21, 2006. Consequently, your June 30 denial letter was issued 9 days after the deadline; which means that the Commission could not deny Mr. Michael's request for certification, and must certify him as a Maine Clean Election candidate as of June 21, 2006.¹

¹If the Commission takes the position that the provisions of the Maine Clean Election Act are mandatory, and not merely directory, then the Commission's own failure to comply with the requirements of §1125(5) require that Mr. Michael be certified as a Maine Clean Election candidate.

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The other reasons for Mr. Michael's appeal are:

A. Rejected Qualifying Contributions

Mr. Michael believes that he did submit at least 2,500 valid qualifying contributions. Mr. Michael and/or his staff will need to review the materials in your office before we can give specific reasons to validate individual contributions and/or R&A forms that you allege to be invalid. However, the following is the list of reasons that he is able to ascertain at this time simply from reviewing the categories of disqualification that you list in your June 30 letter:

1. **Contributor not a registered voter (183)** - Mr. Michael questions your number of 183. Mr. Michael believes that he can prove that many of the contributors are, in fact, registered voters.
2. **No check or money order (24) / No contributor listed for a check or money order (10)** - Mr. Michael questions your numbers of 24 and 10 respectively. Mr. Michael believes he can prove that several, if not all, of the 10 "unclaimed" checks or money orders match up with R&A forms for which no check or money order was attached.
3. **Original but copy never submitted on June 2 (69)** - Mr. Michael questions your number of 69. In addition, whether copies of the R&A forms were submitted on June 2 is not grounds for disqualification because any such violation was "de minimus", the Commission's rule is directory and not mandatory, the Commission's rule frustrates the purpose of the Maine Clean Election Act, and the Commission's rule unconstitutionally impairs the rights of the voter and of the candidate. Furthermore, if any of those contributions were not received by the Commission by June 2, that is also insufficient to disqualify those contributions because all contributions were made by the voters on or before June 2, so any such violation of §1125(4) would be "de minimus." In addition, §1125(4) is directory and not mandatory; and if it were mandatory, it would unconstitutionally violate the rights of the voters and of the candidate.
4. **Original R&A form never provided (29)** - Mr. Michael questions your number of 29. In addition, if original R&A forms were not provided, it is due to the fault of the town voter registers and/or the U.S. Postal Service, and not the fault of Mr. Michael. Mr. Michael believes he can prove that all of these contributors are registered voters.
5. **No contribution made (18)** - Mr. Michael denies that any contributor did not make a qualifying contribution. We assume that most of these contributions were made by personal checks by the contributors. In

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addition, each and every contributor signed R&A form which reads:

**“QUALIFYING CONTRIBUTIONS
RECEIPT AND ACKNOWLEDGMENT**

The candidate named above acknowledges receipt of a \$5 qualifying contribution from each of the undersigned contributors. By signing this receipt, each contributor affirms that he/she has contributed \$5 from their personal funds and has received nothing of value in exchange for his/her signature and contribution.”

While it is not surprising that now, months later, some contributors do not recall making contributions, or even affirmatively deny making contributions, the fact is that they all did make qualifying contributions.

6. **Form not signed by the contributor (6)** - Mr. Michael questions your number of 6. In addition, Title 21-A M.R.S.A. §1122(7)(D) does not require that the R&A form be signed by the donor.
7. **Check not made out to the MCEF (19)** - Mr. Michael questions your number of 19. In addition, if any personal checks are made out to Mr. Michael, rather than to the Maine Clean Election Fund, he will gladly endorse them over to the Fund.
8. **Form submitted to the town after June 2 (219)** - Mr. Michael questions your number of 219. In addition, the Commission's rule does not require that the original R&A forms be submitted to the voter registers by June 2. But if the rule does require the originals to be submitted to the voter registrars by June 2, any violation in this instance would be “de minimus”, since they were all filed with the Commission on or before June 16. In addition, the Commission's rule is directory, and not mandatory; and if the rule did set a mandatory June 2 deadline, that rule would frustrate the purpose of the Maine Clean Election Act and would unconstitutionally impair the rights of the voters and of the candidate.
9. **Form delivered to the Ethics Commission after 10-day deadline (7)** - Mr. Michael questions your number of 7. In addition, Mr. Michael believes you have misread Commission rule §2(4)(H)(2). That rule states that “the verified signature forms will be received by the Commission within 10 business days” after the candidate submits his statement to the Commission. Mr. Michael submitted his statement to the Commission on June 2, which meant that original R&A forms should be filed with the Commission by June 16. In addition, if the rule is to be read as you propose, any violation

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of the rule in this case was "de minimus", since the original R&A forms were filed by June 16. In addition, the Commission's rule is directory, and not mandatory; and to read the rule as mandatory would frustrate the purpose of the Maine Clean Election Act and would unconstitutionally violate the rights of the voters and the candidate.

10. **10-day deadline unknown (279)** - Mr. Michael questions your number of 279. In addition, Mr. Michael believes you have misread Commission rule §2(4)(H)(2). That rule states that "the verified signature forms will be received by the Commission within 10 business days" after the candidate submits his statement to the Commission. Mr. Michael submitted his statement to the Commission on June 2, which meant that original R&A forms should be filed with the Commission by June 16. In addition, if the rule is to be read as you propose, any violation of the rule in this case was "de minimus", since the original R&A forms were filed by June 16. In addition, the Commission's rule is directory, and not mandatory; and to read the rule as mandatory would frustrate the purpose of the Maine Clean Election Act would unconstitutionally violate the rights of the voters and the candidate.
11. **Contribution under \$5.00 (2)** - Mr. Michael questions this.
12. **Contributory signature does not match voter registration card (1)** - Mr. Michael questions this.
13. **Form not submitted to the town registrar (17)** - Mr. Michael questions your number of 17. In addition, Mr. Michael believes he can prove that the contributors were registered voters.
14. **Duplicate contributor (4)** - Mr. Michael questions your number of 4.
15. **No address for contributor on R&A form (1)** - Mr. Michael questions this. In addition, it is our position that if the town voter registrar certifies that the contributor is a registered voter, then the absence of an address is a "de minimus" violation; and/or that this contribution should not be disqualified because the statute calling for an address is directory, and not mandatory.
16. **Check not in the name of the contributor (1)** - Mr. Michael questions this.

In addition to the above itemized grounds for appeal, Mr. Michael generally appeals from the Commission's rejection of any of his qualifying contributions on the grounds that the Commission has discriminated against him and violated his equal

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protection rights under both the Maine and U.S. Constitutions. Mr. Michael believes that no other candidate had their qualifying contributions subjected to the intense level of scrutiny that his qualifying contributions were subjected to or had their qualifying contributions invalidated for such nit picky reasons; and the reason his qualifying contributions were subjected to such intense scrutiny and nit picky invalidation was the fact that he is a conservative Independent candidate.

B. Late Submission of Certification Materials on June 16, 2006.

In your letter you state that Mr. Michael was 35 seconds late in filing his materials on June 16.²

However, rule 2(4)(H)(2) only says that the original R&A forms must be filed within 10 business days of when Mr. Michael submitted his statement. Again, he submitted his statement on June 2; which meant he had to submit the original R&A forms on June 16. The rule does not set any time deadline on June 16. Since Mr. Michael did, in fact, submit his original R&A forms to your office on June 16, he was in compliance with the rule.

No doubt you will take the position that the "business day" ended at 5:00 p.m. on June 16. However, there are two problems with that argument. First, your staff was still in the building conducting business at 5:00.35 p.m., and accepted Mr. Michael's original R&A forms. Therefore, he did file those originals on the 10th business day, and even filed them during business hours (i.e. - while your staff was still there conducting business). And second, I am not aware of any statute that says a business day ends precisely at 5:00.00 p.m. I do not believe the rule permits you to arbitrarily choose a cut off time on the 10th business day.

In addition, even if the rule is read to say that original R&A forms should be filed by 5:00.00 p.m. on June 16, clearly Mr. Michael's alleged violation of that rule must be considered "de minimus", and cannot provide a basis for invalidating all of his qualifying contributions related to the R&A forms that he allegedly filed 35 seconds after that deadline.

Furthermore, it is our contention that this rule is directory, and not mandatory, and therefore does not provide a basis for invalidating those qualifying contributions.

²We find it ironic that you would deny Mr. Michael's request for certification as a Maine Clean Election candidate because he was allegedly 35 seconds late when you were nine days late in issuing your letter of denial. That is roughly 777,600 seconds late!

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Finally, if the rule implicitly contains a 5:00.00 p.m. deadline on the 10th business day, that rule, on its face and/or as applied to the facts of this case, would frustrate the purpose of the Maine Clean Election Act and would unconstitutionally violate the rights of the voters and of the candidate.

C. Non-Compliance with the Provisions of the Act and the Commission's Rules

i. Fraudulent Contributions

Mr. Michael is unaware of any fraudulent contributions, and challenges the Commission to prove that there were any fraudulent contributions.

In addition, for the reasons stated in response A5 above, it is highly unlikely that there were any fraudulent contributions. More likely, the contributors have now forgotten that they made those contributions and that they filled out and signed the R&A form (swearing that they did, in fact, make contributions from their own personal funds) a few months earlier.

Finally, it is our contention that even if the Commission can prove that a rogue contribution collector for Mr. Michael's campaign did submit one or two fraudulent contributions, that is not sufficient grounds for invalidating the other 2,680 plus qualifying contributions.

ii. Submitting Original Receipt and Acknowledgment Forms After the Qualified Period Ended

This appears to be the same reason for disqualification discussed in section A8 above. Mr. Michael appeals for the same reasons discussed there.

In addition, Mr. Michael wants to go on record as taking offense to the implication that he lied when he submitted his written statement on June 2 that:

“Any original sheets not turned in to the Ethics Office today have been delivered to the town clerks on or before 6/2/06 and will be finally delivered to Ethics by me on or before 6/16/06.”

At the time he wrote and signed that form, he absolutely believed that to be true.

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iii. Failure to Provide an Alphabetical List of Contributors

It is our position that you waived the "requirement" of an alphabetical list of contributors when you told us not to worry about submitting that list because your staff was preparing a computer spreadsheet of all contributions, and you could generate an alphabetical list of your own.

In addition, it is our position that any violation of this rule is "de minimus", since your office did, in fact, generate an alphabetical list of your own; and apparently did so prior to June 16.

In addition, it is our position that the alphabetical list rule, section 3(1)(B) is merely directory, and not mandatory.

Finally, it is our position that this rule exceeds the Commission's rule making authority under the Maine Clean Election Act statute, and therefore is invalid. Furthermore, that rule imposes an unnecessary and onerous burden on candidates, and is therefore invalid because it frustrates the purpose of the Maine Clean Election Act and unconstitutionally impairs the rights of the voters and of the candidate.

In addition to the above listed specific reasons for appealing individual grounds for invalidating Mr. Michael's qualifying contributions, Mr. Michael also appeals on the following general grounds:

1. Again, your June 30 denial letter exceeded the statutory deadline under Title 21-A M.R.S.A. §1125(5) by nine days. Therefore, the Commission must certify Mr. Michael as a candidate complying with the requirements of §1125 as a Maine Clean Election Act candidate.
2. The Commission has discriminated against Mr. Michael in violation of his equal protection rights under the Maine and U.S. Constitutions.
3. The Ethics Commission has acted arbitrarily and capriciously in construing, applying, and enforcing the Act and its rules ... statutes and rules that the Commission, itself, does not even comply with.
4. The statutes and rules are directory, and not mandatory, and must be applied rationally and leniently to achieve the purpose of the Act.
5. Invalidating Mr. Michael's qualifying contributions on such nit picky technicalities frustrates the purpose of the Maine Clean Election Act, and

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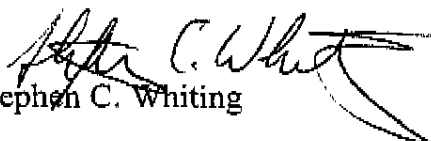
violates the statutory and constitutional rights of the voters and of the candidate.

6. The Ethics Commission is estopped from denying Mr. Michael's request for certification as a Maine Clean Election candidate because it hindered his efforts to comply with the statutes and rules.

Finally, we believe it will take about three (3) weeks to review the extensive materials you have for the 889 alleged "defects" and qualifying contributions. **Therefore, we would appreciate it if the Commission would schedule this appeal for hearing approximately three (3) weeks from the date of this appeal.**

Thank you and best wishes.

Very truly yours,


Stephen C. Whiting

SCW/sr

cc: Phyllis Gardiner, AAG (via mail & fax 287-3145)
John Michael (via mail & fax: 777-4960)